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IN THE

Supreme Court of the United States

October Term, 1966

No. 1058

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

MARTIN HIRSHHORN,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Beow

The Appellate Term of the New York Supreme Court affirmed the judgment without opinion.

Statement

The petitioner was convicted in the Criminal Court of the City of New York, County of New York, after a trial (RINGEL, J.), of VAGRANCY (Code Crim Proc. Sec. 887 (7)) and POSSESSION OF BARBITURATES (Penal Law Sect.

1747-b). On August 2, 1965 Hirshhorn was sentenced to ten days in the Workhouse for vagrancy, and thirty days in the Workhouse for possession of barbiturates, the execution of both sentences being suspended (151-2).* On September 29, 1966, the Appellate Term of the New York Supreme Court, First Department, unanimously affirmed the judgments without opinion (see, appendix to petition, pp. 21-2). Leave to appeal to the New York Court of Appeals was denied by Judge Stanley H. Fuld on November 17, 1966 (appendix, p. 23).

At the trial, a police officer, Detective Farrell, testified that after having been asked by a Brooklyn detective to arrest the defendant on a charge of grand larceny and forgery, he went to the defendant's residence, a hotel in Manhattan. On the day of the arrest, the officer waited outside the hotel until he saw the defendant enter. The defendant "had female clothing on" and Farrell did not recognize him at that time (77-8). When the policeman went up to the defendant's room, he knocked, identified himself as a police officer, and then knocked again. Hirshhorn opened the door, attired in a brassiere and half-slip, and identified himself as "Sandy Lorin" (78-9). The detective then recognized the defendant as the person in female clothing he had seen enter the hotel (81). Hirshhorn told the officer that he knew about the charges in Brooklyn and "invited me in" (80). On the top of a dresser the officer noticed a bottle of pills which the defendant identified as barbiturates, adding that he had no prescription for them (80). Chemical analysis confirmed

* References, unless otherwise indicated, are to pages of the record on appeal.

that the pills contained a barbiturate (84). The defendant, having only female clothes in his wardrobe, then dressed and accompanied the officer to the station house, Hirshhorn being later arraigned in Manhattan on the charges on which he was convicted, as well as possession of marijuana, a charge dismissed by the trial court. About a week later, he was booked and arraigned in Brooklyn on a grand larceny charge which was later dismissed (98-9, 111-12).

The defendant, a twenty-year-old hair stylist (113-14), testified that he wears women's clothes "all the time," and has been wearing them for three years (117-18). On the day in question, Hirshhorn left work at about 5 p.m. and stayed home the rest of the night. At about 11:30 p.m., there was a knock on the door, and a voice said "this is the manager." Before he had a chance to respond, one lock was opened by a key, a chain lock was broken in, and two police officers entered (114-15). They searched the apartment "completely" and found the barbiturates. The defendant had been given the pills to hold for a friend, and had packed them away when he moved from Brooklyn to Manhattan, Hirshhorn being unaware at the time that he had them in his possession (119-21).

Rose Centkowski testified that the bottle of pills looked like one she had obtained by prescription and which her son told her he had given to the defendant to hold. She knew the defendant for about two years, and knew he always wore female clothes, although he was physiologically a male (132-3).

Goldie Talon testified that she received a call from the defendant at 7:30 p.m. on the night in question, and the

defendant said he was calling from the hotel (137-8). Some time later, she went with the defendant to his hotel room, and noticed that the chain lock was broken (138). She knew the defendant for about four or five years, and most of the time he wore female attire and lived as a woman (136-7).

Applicable Statute

The Code of Criminal Procedure of the State of New York

"§887 **Who are vagrants.** The following persons are vagrants:

* * *

7. A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway".

POINT I

The application for certiorari should be dismissed since the case is moot.

The petitioner, whose sentence has run without the attachment of prejudicial legal consequences, is no longer able to obtain further judicial review. The issue being moot, he is precluded from the writ he now seeks. As this Court held in *St. Pierre* v. *United States*, 319 U. S. 41, 42-3 (1943), in dismissing the certiorari petition:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's

judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

This Court reaffirmed the position taken in *St. Pierre,* when it observed in *Parker* v. *Ellis, General Manager, Texas Prison System,* 362 U. S. 574, 575 (1959), "We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in Respondent's custody in at least three cases not relevantly different from the present one (cits. om.)."

The defendant's suspended sentence could not be revoked after August, 1966, when the maximum term which could have been imposed on the misdemeanor conviction expired [see, N. Y. Code Crim. Proc., §470-a]. Hence, the petitioner is no longer subject to any penalties. Moreover, as there are no "other disabilities or burdens" [*Fiswick et al.* v. *United States,* 329 U. S. 211, 222 (1946)] flowing from the judgment below, the case is now moot.

POINT II

The statute is constitutional [answering petitioner's Points I, II and III, pp. 8-15].

Petitioner's contention that the statute in controversy is unconstitutionally vague is in error. In the *Winters* case (*Winters* v. *New York,* 333 U. S. 507 (1948) this Court ruled that legislation is not unconstitutionally unclear so long as it sets up "ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." This language, which has since become a navigational marker for legislative drafters, provides the applicable test, and Section 887(7) meets it. Men of common intelligence can determine both the persons who fall within the scope of the prohibition and the exact behavior forbidden.

Interestingly, the legislative history of §887(7), reveals that at its inception the statute was designed to deal not with all disguises and devices but specifically with men wearing women's dresses. The forerunner of §887(7), Chapter 3 of the Laws of 1845, was passed originally to deal with certain insurrectionists, commonly known as "Indians," who were murdering writ-serving law enforcement officers (see Governor Wright's Message to the Legislature, New York Tribune, January 8, 1845). As part of their costume, these "Indians" wore women's calico dresses, which, of course, help frustrate identification and apprehension.

Petitioner further contends that the statute as applied to transvestites is an unreasonable, arbitrary, unconstitu-

tional exercise of the police power. It is well-recognized that whenever a state's police power comes in conflict with freedom of expression, some balancing process must take place. Thus, "people can dress as they please, wear anything, so long as they do not offend public order and decency." *People* v. *O'Gorman,* 274 N. Y. 284, 287 (1937). But transvestites do offend public order and decency.

The dress of the opposite sex is potentially the most effective of all disguises because it is the most subtle. So basic is a person's sex to his identity, that in most cases law enforcement officers in search of a person initially narrow the scope of inquiry to "male or female." Transvestites are therefore as effectively disguised as if they were masked.

Furthermore, separate and apart from the function the statute serves in the area of crime detection, transvestites, such as the defendant, directly offend and contradict the order of our contemporary culture. Much of our societal conduct is based on the ingrained assumption that those we encounter may be classified as either male or female, and we respond differently, making numerous decisions on the basis of sex. Almost all means of identification such as birth certificates and drivers' licenses indicate the sex of an individual. Selective Service cards must be carried as evidence of registration by males but not females. Indeed, it is fair to observe that personal and commercial relations are ordinarily established with considerations of sex pervading. By hiding in the guise of women, transvestites necessarily frustrate minimum standards of societal order. Camps, beaches, hospitals, hotels, restaurants and other places of public accommodation

must, under law, provide separate facilities for each sex (see, for example, Public Health Law of the State of New York, State Sanitary Code, Chapter 6, Regulation 11; Chapter 7, Regulation 9; Sanitary Code of the City of New York, Regulations 1 and 2). Implicit in a useful administration of these laws and regulations is an assumption that men can be recognized as males and women as females.

Section 887(7) is a proper extension of the police power because of its relation to the health, safety, morals and welfare of the community. In these interests, the Legislature has wisely enacted a statute which prohibits not all disguises or face coverings but only those which are intended specifically to prevent one from being identified. This minor restriction is neither arbitrary nor unreasonable in view of the confusion and chaos it prevents. See 59 Yale L.J. 1351, 1353 and nn. 7 and 8 (1950). Moreover, even when society has a serious concern with the regulation of given conduct, that concern must on occasion yield to counterbalancing considerations. But that situation does not arise here, for there is no significant social value to be perceived in the defendant's activities. To prohibit men from dressing as women with an intent to deceive is to prohibit a pattern of behavior that is utterly without significance to a vital society.

Petitioner also asserts that the vagrancy statute as applied to transvestites works a cruel and unusual punishment. He reaches this conclusion by terming transvestism an "illness," and cites *Robinson* v. *California* [370 U. S. 660 (1962)] which overturned a statute penalizing the "sickness" of drug addiction. In contrast to *Robinson*,

however, the present statute does not punish the physical or mental "need" which affects the defendant. He is perfectly free to indulge his sartorial tastes in any private place, where it will not offend public order and decency. The sanctions of the law are applicable only when he acts out his desires on "a road or public highway." Such conduct is subject to penal sanctions much as an exhibitionist, impelled by a similar mental need, can be penalized for public expression of his "illness."

POINT III

The seizure of the barbiturates was proper [answering petitioner's Point IV, pp. 15-19].

The petitioner claims that the request of the Brooklyn detective and the information he provided did not give the arresting officer probable cause to take the defendant into custody. But it is not necessary to rely on this information to justify the arrest and seizure. The officer, when he recognized the defendant as being the man who entered the hotel wearing women's clothes, had sufficient grounds to arrest him on that charge alone and conduct a search incidental to it. For he thereby had probable cause to believe a crime had just before been committed in his presence.

Moreover, another independent ground exists justifying the seizure of the barbiturates. In *Ellison* v. *United States* [260 F.2d 476 (D.C. Cir. 1953)] police officers, suspecting the defendant of committing a robbery, rang his doorbell. When the door opened they observed fruits of a crime in

plain view. The court held that no search had occurred and sustained the seizure of the articles. Here, even if there was no probable cause to arrest, the police officer could at least go to the premises to interview a suspect and investigate the larceny charge. Once there, according to his testimony, he was invited inside by the defendant. Noticing the bottle of pills on top of a dresser, he asked the defendant about them, and Hirshhorn told him that the pills contained barbiturates for which he had no prescription. Consequently, while the officer was lawfully on the premises, the defendant simply admitted facts which revealed that he was in possession of contraband, thereby subjecting the barbiturates to seizure and himself to arrest.

Conclusion

The petition for writ of certiorari should be dismissed or denied.

Respectfully submitted,

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